BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSA BUJANDA	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,060,558
	)	
CERTAINTEED CORPORATION	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 27, 2012, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. John R. Fox, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had an April 9, 2012, date of accident and gave respondent timely and appropriate notice of her injury. Accordingly, the ALJ found that claimant was entitled to medical treatment for her carpal tunnel conditions, as well as temporary total disability benefits for the period from May 1, 2012, until she is released to return to work, has been offered accommodated work within her restrictions, has attained maximum medical improvement, or further order of the court.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 1, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

ISSUES

Respondent contends the ALJ erred in finding that claimant had a date of accident of April 9, 2012. Respondent asserts the latest date claimant could claim as a date of

[1] At the preliminary hearing, the parties requested and the ALJ agreed that the record would be held open for an independent medical report from Dr. John Estivo. That report was stamped received by the Division of Workers Compensation on August 22, 2012.

injury was February 23, 2012, and that claimant therefore failed to provide respondent with timely notice of injury.

Claimant argues that the evidence shows claimant's date of injury was April 3, 2012, and that she provided respondent with timely and sufficient notice of her injury.

The issues for the Board's review are: What is claimant's date of accident or repetitive trauma injury, and did claimant provide respondent with timely and sufficient notice of her accidental or repetitive trauma injury?

FINDINGS OF FACT

On April 24, 2012, claimant filed an Application for Hearing claiming a series of accidents from repetitive job duties through April 3, 2012, causing injuries to her bilateral upper extremities.[2]

The records of Dr. David Buller, claimant's personal physician, were entered into the record at the preliminary hearing. Those records show that on October 19, 2011, claimant complained of muscle spasm in her right hand and felt like she could not move her hand. The spasm went away and then she noticed some numbness in her right hand. She could not remember a specific injury but told Dr. Buller she worked at respondent at a job that involved using an air gun. She said the gun was fairly heavy and she would have to pull the trigger while blowing off the floor. Claimant told Dr. Buller she started noticing pain after performing that task. Dr. Buller diagnosed her with paresthesia of the right hand. He gave claimant a note for work indicating he thought she had inflammation of her ulnar nerve but could return to work with no restrictions.

Claimant returned to Dr. Buller on November 18, 2011, for a follow-up on her asthma. At that time, she told Dr. Buller that when at work, she primarily used her right hand performing repetitive motions and that she had a carpal spasm.

Claimant saw Dr. Buller on February 23, 2012. She told him she worked for respondent and did a lot of repetitive motions with her hands. She reported she had been noticing some numbness to her right hand, as well as pain from time to time. After examining claimant, Dr. Buller diagnosed her with right carpal tunnel syndrome and placed her in a wrist brace to wear at night.

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[2] Claimant did not testify in this matter. At the preliminary hearing held June 1, 2012, it was agreed by the parties that a discovery deposition previously taken of claimant would be made a part of the evidence in this case. The Division's records do not show that this deposition was forwarded to the ALJ by counsel for either party or by the court reporter, and the ALJ did not consider any testimony of claimant in making his preliminary hearing Order.

On April 3, 2012, Dr. Buller provided claimant with a slip taking her off work until April 9, 2012, due to wrist pain.[3] Dr. Buller saw claimant on April 9, 2012, for follow up of her right carpal tunnel syndrome. Claimant told him she still had numbness and pain with any repetitive motion. Dr. Buller noted, "She works at CertainTeed so does a lot of repetitive motion and is getting almost constant numbness and tingling."[4] He referred claimant to Dr. Mark Melhorn for a surgical consultation and kept her off work.

Claimant saw Dr. Buller on April 16, 2012, and for the first time complained of pain in her left wrist. She again reported her repetitive work at respondent. Dr. Buller diagnosed her with De Quervain's tenosynovitis of the left hand, calling it a "repetitive motion injury from her work she describes at CertainTeed."[5]

Kathy Boas is respondent's human resources and safety manager. She testified that claimant began working for respondent as a temporary worker in March 2009 and became a regular employee in August 2010. Claimant was hired as an extrusion operator and was responsible for using a crane to move pipe, for deburring pipe, building packs and cleaning out the extruding machines.

Ms. Boas said respondent's safety policy is in the current employee handbook. It states that employees must immediately notify the appropriate supervisor or the human resources department of any injury, no matter how insignificant. Employees are given a copy of the employee handbook at the time of the new hire orientation. Claimant was presented with a copy of the handbook on July 20, 2010, and an acknowledgment of the receipt of the handbook was signed by claimant on that date. Respondent also has monthly safety meetings, where the importance of reporting any accident is stressed.

Ms. Boas said claimant's last day of work at respondent was on April 2, 2012.[6] To her knowledge, claimant did not miss any time from work in October, November, or December 2011, or January, February or March 2012. Ms. Boas testified that claimant did not report to respondent that she was having physical problems with either her right or left forearm, wrist, hand or fingers before her last day of work on April 2, 2012. Claimant never asked respondent to send her to a physician or otherwise provide any medical attention for problems she was having with her right or left upper extremity. Claimant never asked respondent to permit her to see Dr. Buller.

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[3] P.H. Trans., Resp. Ex. C. There is no indication in the record that Dr. Buller saw claimant on April 3, 2012.

[4] P.H. Trans., Cl. Ex. 1 at 7.

[5] *Id.*

[6] At the time of the preliminary hearing, claimant was still employed by respondent.

Ms. Boas said that on April 3, 2012, claimant gave her a doctor's note in which Dr. Buller took claimant off work until April 9 due to wrist pain. That note was Ms. Boas' first information concerning claimant's needing to be off work because of wrist problems. Claimant came back to Ms. Boas' office on April 9, 2012, with another off-work slip, this time keeping her off work until April 24, 2012, due to a medical condition. Claimant told Ms. Boas that Dr. Buller said claimant's condition was work-related. Ms. Boas responded to claimant that she had no knowledge that this was work related and suggested claimant file for short term disability. Ms. Boas gave claimant the FMLA paperwork as well as information about short term disability at that time. At no time before April 9, 2012, had claimant ever reported to respondent that the problems with her hands were work related. Claimant returned the completed FMLA paperwork to Ms. Boas on April 10, 2012.

Ms. Boas said the April 3, 2012, off-work slip from Dr. Buller was the first time a doctor took claimant off work for repetitive trauma to her upper extremities. Claimant had not previously been given restrictions and her job duties had not been modified before that date.

Calvin Bruner is the B shift supervisor at respondent. He has been claimant's supervisor since June 6, 2011. He testified that he would conduct tool box meetings with employees. At some of those meetings, he would emphasize that any physical problem an employee has that is caused by work should be reported to a supervisor. In October 2011, Mr. Bruner had a conversation with claimant about a problem she was having with her right shoulder. Claimant told him she had a burning feeling in her right shoulder. Mr. Bruner asked claimant if she wanted to go to the hospital, and she said no. Mr. Bruner then called Ms. Boas. During this conversation, it was decided to provide claimant a ride home, and Mr. Bruner took claimant home in the company truck. To the best of his recollection, claimant did not miss any other time from work as a result of the shoulder problem.

Mr. Bruner said that claimant came up to him one time and told him her wrist was sore. He asked her if she wanted to be taken to the hospital, and she said no, that she was fine, and then she went back to work. Mr. Bruner could not remember when that conversation was held. He does not remember a time when claimant reported a physical problem with her wrists, hands or fingers being caused by her work activities. Claimant worked under his supervision until she was taken off work by Dr. Buller on April 3, 2012.

Claimant was seen for independent medical examinations by Dr. C. Reiff Brown, requested by claimant's attorney, and by Dr. John Estivo, requested by respondent. After examining claimant, Dr. Brown concluded that claimant had bilateral carpal tunnel syndrome as a result of her repetitious work activities. Dr. Estivo opined that claimant had De Quervain tenosynovitis to the right wrist and probable right and left carpal tunnel syndrome. He believed the prevailing factors in claimant's conditions were her work duties at respondent.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident

> or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> . . . .
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Claimant has alleged she suffered bilateral upper extremity injuries from a series of accidents. Claimant does not specify a starting date for this alleged series of accidents, but in her Application for Hearing filed April 24, 2012, she alleged an ending date of April 3, 2012. Presumably, claimant was alleging she suffered injury on more than just that one day, April 3, 2012, and by "series" she meant both a "series" of traumas and a "series" of days. Part of the definition of an "accident" found in K.S.A. 2011 Supp. 44-508(d) is that it occur during a single work shift. Subsection (e) of that same statute defines "repetitive trauma" as "cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas." In her brief to the Board, claimant acknowledges that her claim is for injuries from repetitive trauma, not an accident. Subsection (e) also provides the basis for a determination of the "date of injury" for a repetitive trauma injury. In this case, the earliest of those enumerated events was April 3, 2012, the date claimant was placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma injury. The record fails to establish that claimant was advised by a physician her condition was work related before that date.

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

Claimant gave respondent notice of her injury on April 9, 2012. This was within 30 days of her date of injury but not within 20 days from the February 23, 2012, date that medical treatment was sought for the injury. Nevertheless, the statute cannot be read to require notice of injury before the date of injury.[9] Claimant gave notice of injury to respondent within 20 days of her date of injury.

CONCLUSION

Claimant has proven she sustained injuries to her bilateral upper extremities by repetitive traumas with a legal date of injury of April 3, 2012, and that notice was timely given.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 27, 2012, is modified to find claimant's injuries were due to repetitive trauma and that her date of injury was April 3, 2012, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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[9] See *Walker v. General Motors, LLC*, Docket No. 1,059,354, 2012 WL 2061788 (Kan. WCAB May 30, 2012); *Vergara v. Perfekta, Inc.*, Docket No. 1,059,159, 2012 WL 2061786 (Kan. WCAB May 18, 2012).